IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WARREN S. JONES, JR., et al.,	:	
Plaintiffs	:	
	:	
v.	:	Civil No. AMD 08-1047
	:	
MYSTIC HARBOUR CORP., et al.,	:	
Defendants	:	

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MEMORANDUM and ORDER

Plaintiffs Warren S. Jones and Gale S. Jones ("the Joneses"), who are husband and wife citizens of New Jersey, purchased for $500,000 a lot ("Lot 439") in a residential development in Ocean City, Maryland in April 2005. Sometime after the closing on their purchase, they discovered that the lot required a special exception issued by the Worcester County Zoning Board before a home could be constructed.

In this action, the Joneses, who are acting pro se although Mr. Jones is an attorney admitted to practice in New Jersey, brought this action against the seller, defendant Mystic Harbour Corp. ("Mystic"), and its principal, John H. Burbage, Jr. ("Burbage"), and a real estate brokerage, Coldwell Banker Residential Brokerage ("CBRB"), and two of the latter's agents, asserting six claims: (1) breach of contract; (2) "rescission of contract;" (3) violation of the Maryland Consumer Protection Act; (4) common law fraud; (5) unjust enrichment; and (6) negligence (as to CBRB only).

Defendants filed motions to dismiss and/or in the alternative for summary judgment which, in light of the many exhibits accompanying the motions, could only be viewed, in substance, as motions for summary judgment. Plaintiffs opposed those motions and filed

motions to amend their complaint and for discovery. A hearing was held, during which the parties were heard at length. The day after the hearing, plaintiffs, no doubt motivated by the deep skepticism expressed by this court as to the viability of their claims, voluntarily dismissed the action. Now before the court are the motions of defendants Mystic and Burbage ("Movants") for sanctions (pursuant to Fed.R.Civ.P. 11) and for attorney's fees (pursuant to Maryland statutes and the contract of sale). Those motions shall be denied for the reasons stated herein.

I.

The facts may be quickly summarized. In March 2005, plaintiffs entered into a contract for the purchase of Lot 439, located in Berlin, Maryland, from defendant Mystic. The contract of sale was executed on behalf of Mystic by its president, Burbage. The agreed price was $500,000. During closing in April 2005, the Joneses explained that they planned to build a residence on Lot 439 but that they would have to postpone doing so because they had exhausted their finances in purchasing the lot. The parties did not discuss zoning, building permits, or other issues relating to construction during this meeting.

In June 2005, unbeknownst to plaintiffs, Mystic applied for a special exception for Lot 439 (as well as adjoining Lot 440) with the Worcester County Board of Zoning Appeals. Following a hearing, the Board of Zoning Appeals granted the special exception on July 14, 2005. The Board of Zoning Appeals found that "[b]oth lots are buildable but need the special exception because they are located in a C-1 district." Indisputably, a special exception issued by the Board lasts only for one year if construction on the property for which it was issued does not begin within the year.

Having learned that their special exception would expire absent substantial progress in construction, plaintiffs proceeded to protect their rights and, by July 25, 2006, they had hired a contractor and obtained a building permit. Thereafter, by renewing their building permit, they obtained an extension on the special exception of an additional year in July 2007. In contemplation of building on Lot 439, the Joneses conducted site evaluations and had building plans drawn, apparently before they were financially fully able to incur such costs. Moreover, plaintiffs spent in excess of $9,000 to clear the land and for installation of a silt fence, and approximately $11,000 to install wiring necessary to bring electrical power to Lot 439. Their funds exhausted, however, on April 25, 2008 (on the eve of the date the statute of limitations would otherwise bar their claims), plaintiffs filed their complaint in this action, seeking recission and/or damages on the theories mentioned above.

As mentioned, they voluntarily dismissed this case immediately after the hearing on the motions.

II.

At bottom, all of plaintiffs' claims rested on the following fundamental assertions: (1) defendants fraudulently or negligently informed them that Lot 439 was a "valid buildable lot;" (2) they purchased Lot 439 in reasonable reliance on these misrepresentations; and (3) Lot 439 was not, in fact, a "valid, buildable lot" without a special exemption from the Zoning Board.

Movants seek an award of attorney's fees on the general basis that the suit was filed frivolously, vexatiously and in bad faith, and that the contract of sale specifically provides for an award of attorney's fees to a prevailing party in litigation arising out of the contract

or its breach.

To be sure, plaintiffs' claims were thin, indeed. As to breach of contract, it is well-settled that, under Maryland law, the acceptance of a deed for the sale of land "gives rise to a prima facie presumption that it is in execution of the entire contract of sale and that the rights of the parties are to be determined by the deed." *Millison v. Fruchtman*, 214 Md. 515, 518, 136 A. 2d 240 (Md. 1957). As a consequence of this "merger" between the contract and the deed, the "agreement of sale . . . becomes null and void, except where the agreement contains covenants collateral to the deed and where the deed appears to be only a partial execution of the contract." *Stevens v. Milestone*, 190 Md. 61, 65, 57 A.2d 292 (Md. 1948). Thus, once a deed has been executed, there can be no claim based on breach of the contract that has merged into the deed. The doctrine of merger by deed clearly barred a breach of contract claim here. (Moreover, and in any event, the contract itself and commonsense placed the burden on plaintiffs to assure themselves of the status of zoning and other publicly ascertainable facts regarding the land at issue.)

Furthermore, rescission is "a radical remedy; it therefore must be promptly asserted once a party discovers facts which justify it." *Ellerin v. Fairfax Savings Assoc.*, 78 Md. App. 92, 109, 552 A.2d 918 (Md. Ct. Spec. App. 1989). Here, plaintiffs waited for three years before demanding rescission. If their main concern with Lot 439 was the lack of the special exception at the time of closing, then they clearly failed to act with the alacrity the law demands of one who seeks rescission. *See Wolin v. Zenith Homes, Inc.*, 219 Md. 242, 250-51, 146 A.2d 197 (Md. 1950) ("Acts by a purchaser which constitute acquiescence, ratification or estoppel will preclude him from rescinding the contract.").

As for their fraud claim, plaintiffs rested on a more plausible, if ultimately unsustainable, factual and legal foundation. Although the court reached a preliminary conclusion at the motion hearing that plaintiffs had failed to satisfy the heightened pleading standards of Fed.R.Civ.P. 9(b), requiring that fraud be pled with specificity, the court was prepared to permit plaintiffs to amend their complaint to cure their pleading deficiencies.[*]

Finally, a claim for unjust enrichment is only available when no contract exists between the parties. *See County Comm'r of Caroline County v. J. Roland Dashiel & Sons, Inc.*, 358 Md. 83, 96, 747 A.2d 600 (Md. 2000). Thus, with the single exception of a possible claim for fraud, plaintiffs' claims lacked merit.

III.

All that said, the court is not prepared to ascribe the label "frivolous" to this action, and shall decline to award sanctions under Fed.R.Civ.P. 11. Although plaintiffs may have

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[*]In Maryland, a claim of fraud requires a showing of the following elements: "(1) the defendant made a false representation to the plaintiff, (2) the falsity of the representation was either known to the defendant or the representation was made with reckless indifference to its truth, (3) the misrepresentation was made for the purpose of defrauding the plaintiff, (4) the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) the plaintiff suffered compensable injury as a result of the misrepresentation." *Hoffman v. Stamper*, 385 Md. 1, 28, 867 A.2d 276 (Md. 2005).

As to the first element, plaintiffs alleged that defendants falsely represented to them that Lot 439 is valid residential building lot. The parties never spoke about special exceptions or other zoning issues before closing. In Maryland, the "mere non-disclosure of facts known to defendant without intent to deceive is not fraud and is not actionable under Maryland law unless there exists a separate duty of disclosure to plaintiff by defendant." *Finch v. Hughes Aircraft Co.*, 57 Md. App. 190, 232, 469 A.2d at 888 (Md. Ct. Spec. App. 1984), *cert. denied*, 300 Md. 88, 475 A.2d 1200 (Md. 1984), *cert. denied*, 469 U.S. 1215 (1985). Here, plaintiffs did not allege that defendants intended to deceive them, but such an allegation is not foreclosed on the record as it stood at the time of the voluntary dismissal.

Similarly, although it was unlikely that plaintiffs would ever marshal the evidence to prove the remaining elements of fraud by the applicable clear and convincing standard (and thus their decision to abandon their claims was a wise one), it seems clear that sufficient allegations could have been made, in good faith, such that plaintiff would be entitled to conduct discovery.

been motivated by a form of "buyers' remorse" in seeking to undo their ill-timed purchase, there has been no showing of a lack of good faith in pursuing their claims. Admittedly, as Mr. Jones is a member of the Bar of New Jersey, the court should not indulge his behavior in this action on the basis of personal financial desperation, or on the basis of any suggestion that he proceeded here with "a pure heart and empty head," *see Zuniga v. United Can Co.*, 812 F.2d 443, 452 (9th Cir. 1987), and the court does not do so. Rather, the court recognizes that "when distinguishing between claims that are losing claims and those that are losing and sanctionable, courts must avoid hindsight and resolve all doubts in favor of the claimant." *Eastway Constr. Corp v. City of New York*, 762 F.2d 243, 254 (2d Cir.1985), *cert. denied*, 484 U.S. 918 (1987). Even Movants concede that "[t]he issues raised in this case were . . . novel and difficult." *See* Defs.' Mem. Supp. Mot. Atty. Fees at 9. Accordingly, the court concludes that plaintiffs' claims were colorable, i.e., that they were "losing" but not "sanctionable."

As to the contractual claim for attorney's fees, the court applies Maryland law and acknowledges that the agreement here provided for an award of attorney's fees to a prevailing party in litigation arising out of the contract. *See generally Royal Investment Group, LLC v. Wang*, --- A.2d ----, 2008 WL 5088600, *23-*25 (Md. Ct. Sp.App., Dec. 4, 2008). Nonetheless, the court declines to make an award.

Under this court's local rules, "Counsel for a party intending to seek fees if the party prevails shall submit to opposing counsel quarterly statements showing the amount of time spent on the case and the total value of that time . . . . Failure to submit these statements may result in a denial or reduction of fees." *See* Local Rules, D. Md., Appx. B, at 1.c. (2008).

There has been no showing here that plaintiffs were served with quarterly time records by counsel for any parties-defendant. Although plaintiffs' failure to request the fee statements would foreclose plaintiffs' reliance on the guideline, *see id*. at note 3, here the court acts *sua sponte*, not in reliance on a request by plaintiffs. The court does so in the exercise of an informed discretion under the circumstances of this case, including but not limited to the early termination of the case by plaintiff after hearing the court's views as to the merits of their claims. Thus, the court is not required to examine the actual reasonableness of the claim for fees.

IV.

For the reasons set forth, the motions for sanctions and for attorney's fees (Paper Nos. 37, 38) are DENIED.

The Clerk shall MAIL a copy of this Memorandum and Order to plaintiffs pro se.

Date: December 17, 2008

/s/
Andre M. Davis
United States District Judge